In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. [redacted] 19

NATIONAL UNION OF MARINE COOKS & STEWARDS, a voluntary association,
Petitioner,

vs.

GEORGE ARNOLD, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of Washington.

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To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of the State of Washington, entered on July 3, 1953, dismissing the appeal of petitioner from a money judgment in the sum of $475,000.

OPINION BELOW.

The order of the Supreme Court of the State of Washington dismissing petitioner's appeal (R. 53) is unreported.

JURISDICTION.

The judgment of the Supreme Court of the State of Washington was entered on July 3, 1953. The order denying petitioner's timely petition for rehearing was entered on August 19, 1953. (R. 56.) On November 6, 1953, Mr. Justice Douglas entered an order extending the time for filing the within petition for certiorari to January 16, 1953. (R. 60.) The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

The federal questions presented herein were precipitated by respondents' original motion before the Court below (i.e., the Supreme Court of Washington, not the trial Court) to dismiss petitioner's appeal. (R. 11-14.) Petitioner interposed its claim for federal constitutional protection in the very first document it filed thereafter, its "Answering Brief of Appellants Upon Motion for Dismissal of Appeal." (R. 17, 22.)[1] The Court below failed to pass upon federal issues raised at any stage of the proceeding.

Since the basis for the motion to dismiss the appeal was an adjudication of contempt before the trial Court

[1]This claim was consistently thereafter raised: Appellants' Brief in Opposition to Supplemental Motion for Dismissal of Appeal (R. 26, 28); Brief in Support of Motion to Docket Appeal for Argument, Or In the Alternative, to Stay Proposed Dismissal of Appeal (R. 42, 43); Petition for Rehearing (R. 53, 54).

in *supplemental* proceedings (R. 9, 10), and the motions to dismiss were made for the first time before the Court below, *subsequent to the perfection of the appeal* (R. 12), the federal issues were presented at the earliest possible time. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673; *Great Northern Ry. Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358.

QUESTIONS PRESENTED.

Whether it was either a deprivation of property without due process of law or a denial of the equal protection of the laws, each guaranteed by the Fourteenth Amendment to the Constitution of the United States, for the Court below to dismiss petitioner's appeal on the merits solely because petitioner had been found in contempt of the trial Court in supplemental proceedings.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fourteenth Amendment to the Constitution of the United States provides, as pertinent:

> ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT.

On September 4, 1951, respondents (ninety-five in number) each recovered a judgment against petitioner and its agent, Joseph Harris, for $5,000, or a total judgment of $475,000.00. (R. 1-8.) Appeals by both petitioner and Harris were duly perfected. (R. 9.)

Thereafter in supplemental proceedings, respondents obtained orders from the trial Court adjudging petitioner in contempt for failure to deposit over a quarter of a million dollars in bonds with a Court appointed receiver. (R. 9, 14.) On the basis of this adjudication, respondents immediately moved to dismiss the appeals of both petitioner and its agent Harris. (R. 11.) On May 17, 1952, the Court below ordered both appeals stricken from the calendar pending its determination of petitioner's appeal from the contempt adjudication. (R. 23-24.)[2]

After over a year's submission, the contempt adjudication was ultimately affirmed. *Arnold v. National Union of Marine Cooks, etc.*, 42 Wn. (2d) ____; 142 Wash. Dec. 590. At the conclusion of the contempt opinion, the Court below ordered petitioner to purge itself of the contempt by "delivery of the bonds to the receiver" on pain of dismissal of its appeal in the within case.[3]

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[2]On May 29, 1952, respondents filed a supplemental motion to dismiss the appeals on the ground that petitioner's appeal from the contempt adjudication should be likewise dismissed. (R. 24-25.) This latter motion was denied. *Arnold v. National Union of Marine Cooks, etc.*, 41 Wn. (2d) 22.

[3]The pertinent language appears in *Arnold v. National Union of Marine Cooks, etc.*, 42 Wn. (2d) ____; 142 Wash. Dec. 590, at

Thereafter, both petitioner and Harris filed separate motions to docket their pending appeals for argument (R. 39, 41); and respondents renewed their motion to dismiss both appeals. (R. 44.) After argument on the various pending motions, the Court below granted Harris' motion to docket his appeal,* denied petitioner's motion to docket its appeal, and granted respondents' motion to dismiss petitioner's appeal. (R. 52.)

Accordingly, the Court below entered its order dismissing petitioner's appeal. (R. 53.) A petition for rehearing was duly filed (R. 53-56), and was denied on August 19, 1953 (R. 56), and a formal judgment and remittitur was entered. (R. 57-58.)

596, as follows: "The adjudication of contempt is affirmed, and the appeal presently pending in the main action shall be dismissed unless, within fifteen days from the date of the remittitur herein, the appellant union purges itself of the order of contempt, by complying with the trial court's order requiring delivery of the bonds to the receiver."

*The appeal of Harris was argued and submitted on October 8, 1953. No opinion has yet been filed. Since petitioners' liability is based exclusively on the theory of *respondeat superior*, the judgment against it cannot stand, if the judgment against its agent Harris is reversed. The court below has repeatedly so held. *Dorenus v. Root*, 23 Wash. 710; *Ogilvie v. Hong*, 175 Wash. 209; *Gerritsen v. Seattle*, 164 Wash. 459; *Duvall v. Pioneer Sand & Gravel Co.*, 191 Wash. 417; *Forquer v. Hidden*, 191 Wash. 638; *Johns v. Hake*, 15 Wn. (2d) 651; *Marshall v. Chapman's Estate*, 31 Wn. (2d) 137. This results even if a final judgment has been obtained. *See In re LeFevre*, 9 Wn. (2d) 145, where a nonappealing guardian was held entitled to the benefits of the appeal of the surety.

SPECIFICATIONS OF ERROR TO BE URGED.

The Supreme Court of the State of Washington erred:

1. In denying petitioner's motion to docket its appeal for hearing;

2. In granting respondents' motion to dismiss petitioner's appeal;

3. In denying petitioner's petition for rehearing.

REASONS FOR GRANTING THE WRIT.

THE ORDER DISMISSING PETITIONER'S APPEAL IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OF THE CIRCUIT COURTS OF APPEALS, AND DEPRIVES PETITIONER OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW AND DENIES TO PETITIONER THE EQUAL PROTECTION OF THE LAWS.

This petition presents some of the issues left untouched by this Court in *Hovey v. Elliott*, 167 U.S. 409. In that case the Supreme Court of the District of Columbia had ordered the defendants' answer stricken for failure to comply with an order to transfer funds totaling $49,297.50 (the subject matter of the action) to a court-appointed receiver. Thereupon a default judgment was entered. Thereafter, however, the Court of Appeals for New York refused to give the default judgment full faith and credit. This Court, after an exhaustive examination of the pertinent cases, affirmed the decision of the New York Court.

The precise issue before the Court was:

". . . whether a court possessing plenary power to punish for contempt, unlimited by statute,[5] has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court." (167 U.S. at 413.)

This Court concluded:

". . . analysis . . . conclusively establish[es] that there is no basis for the assertion that the courts of chancery in England claimed or exercised the power, after answer filed, to decree *pro confesso* on the merits against a defendant, merely because he persisted in disobedience to an order of the court, though the cases do show that the chancery courts commonly refused to hear a defendant in contempt when asking at their hands a favor. The difference between the want of power, on the one hand, to refuse to one in contempt the right to defend in the principal case on the merits, and the existence of the authority, on the other, to refuse to accord a favor to one in contempt, is clearly illustrated by the whole line of adjudicated cases." (167 U.S. at 423-4.)

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[5]See footnote 12, *infra*, where it is pointed out that the manner of exercise of the contempt power is proscribed by statute in the State of Washington.

Adverting to the problem specifically raised herein, this Court noted, quoting from *McKane v. Durston*, 153 U.S. 687, that:

> "An appeal from a judgment of conviction is not a matter of absolute right, independent of constitutional or statutory provisiors[6] allowing such appeal." (167 U.S. at 443-4.)

And, immediately thereafter, this Court reserved opinion on the merits of the instant situation:

> "Whether in the exercise of its power to punish for a contempt a court would be justified in refusing to permit one in contempt from availing himself of a right granted by statute, where the refusal did not involve the fundamental right of one summoned in a cause to be heard in his defense, and where the one in contempt was an actor invoking the right allowed by the statute, is a question not involved in this suit." (167 U.S. at 444.)

The Court below, in the instant case, dismissed petitioner's appeal solely because of a failure to comply with an order to satisfy a substantial portion of the judgment appealed from by posting bonds with a Court appointed receiver. That dismissal is at odds with the rationale of *Hovey v. Elliott*, deprives petitioner of its property without due process of law, and denies to petitioner the equal protection of the laws as guaran-

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[6]See footnotes 7 and 8, *infra*, where the statutory (and court rule) provisions respecting the right of appeal, relevant to the instant case, are quoted.

teed by the Fourteenth Amendment to the Constitution of the United States.

While it would not be a deprivation of due process to abolish the right to appeal altogether or in certain cases (*District of Columbia v. Clawans*, 300 U.S. 617) or a denial of equal protection to provide different appellate procedures (*Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U.S. 74) or different appellate remedies to different classes of litigants (*Pittsburgh, etc., Ry. Co. v. Backus*, 154 U.S. 421), it is quite different to deprive one specific litigant of the right to defend against a judgment by way of an appeal, when such right of appeal is granted by statute to all litigants.

The State of Washington by statute[7] and Court rule[8] grants to all litigants the right to appeal from money judgments. And the State Supreme Court is required to hear all such appeals on the merits.[9] Contempt is

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[7]Revised Code of Washington (hereinafter cited RCW) 4.88.010, provides as relevant: "Any party aggrieved may appeal to the supreme court in the mode prescribed in this chapter from any and every of the following determinations, and no others, made by the superior court, or the judge thereof, in any action or proceeding: (1) From the final judgment entered in any action or proceeding . . ."

[8]Rules on Appeal 14, 34A Wn. (2d) 20, provides as relevant: "Any party aggrieved may appeal to the supreme court in the mode prescribed in these rules from any and every of the following determinations, and no others, made by the superior court, or the judge thereof, in any action or proceeding: (1) From the final judgment entered in any action or proceeding . . ."

[9]RCW 4.88.280 provides: "The supreme court shall hear and determine all causes removed thereto in the manner hereinbefore provided, upon the merits thereof, disregarding all technicalities, and shall upon the hearing consider all amendments which could have been made as made."

not one of the grounds specified in either the statute[10] or the Court rule,[11] for the dismissal of such, or any, appeals, nor is the dismissal of such an appeal specified as a ground for the punishment of a contempt.[12]

Thus the statutory structure, the Court rules, and the decisional law of the State of Washington grant

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[10]RCW 4.88.150 as relevant provides: "Any respondent may move the supreme court, at such time and in such manner as the court by its rules prescribes, to dismiss an appeal either on the ground that the court has no jurisdiction of an appeal from the judgment or order from which the appeal was taken, or that the notice of appeal was not served or filed within the time limited by law, or is insufficient, or that the appeal bond was not filed within the time limited by law, or is not in form or substance such as to render the appeal effectual, or that the appellant's brief has not been served or filed, or that the record on appeal has not been sent up, or that the appeal has not been diligently prosecuted or on any ground going to the merits of the further prosecution of the appeal, or on any two or more of the grounds herein mentioned . . ."

[11]Rules on Appeal 51, 34A Wn. (2d) 55, likewise provides as relevant: "Any respondent may move the supreme court to dismiss an appeal either on the ground that the court has no jurisdiction of an appeal from the judgment or order from which the appeal was taken, or that the notice of appeal was not served or filed within the time limited by rule, or is insufficient, or that the appeal bond was not filed within the time limited by rule, or is not in form or substance such as to render the appeal effectual, or that the appellant's brief has not been served or filed, or that the record has not been sent up, or that the appeal has not been diligently prosecuted, or on any ground going to the merits of the further prosecution of the appeal, or on any two or more of the grounds hereinabove mentioned . . ."

[12]RCW 7.20.090 provides: "Upon the evidence so taken, the court or judicial officer shall determine whether or not the defendant is guilty of the contempt charged; and if it is determined that he is guilty, shall sentence him to be punished as provided in this chapter." The chapter (Chapter 20 of Title 7 of the Revised Code of Washington) makes no provision for the dismissal of an appeal as punishment for contempt. The court below, from an early date has held that the courts are limited in the exercise of contempt powers to the statutorily prescribed manner. *In re Coulter*, 24 Wash. 526.

an appeal on the merits without regard to the "contempt status" of the appellant.

While in its narrow holding *Hovey v. Elliott* was limited to the right to defend at the initial hearing, the rationale of the decision applies with equal force to the instant case, where there has been a denial of the statutory right to an appeal from a judgment. The judgment may be equally invalid whether granted by default or affirmed by default. The litigant is deprived of his property without due process of law in either case. In both cases an asserted *defensive* right is destroyed.

The case at bar is unlike *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, which affirmed a state court default judgment entered after the defendant had refused to testify or to produce material evidence. In the *Hammond* case this Court recognized the fundamental validity of *Hovey v. Elliott* and emphasized the difference in the two cases.

> "Hovey v. Elliott involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession, and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. . . . The difference between mere punishment, as illus-

> trated in Hovey v. Elliott, and the power exerted in this, is as follows: In the former, due process of law was denied by the refusal to hear. In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." (212 U.S. at 350-351.)

The *Hovey* doctrine has recently been followed (*Duell v. Duell*, 178 F. (2d) 683 [CA DC, 1949]),[13] and even extended to protect the right of intervention (*Deauville Associates v. Eristavi-Tchitcherine*, 173 F. (2d) 745 [CA 5, 1949]). In the last cited case, the Court of Appeals said, *supra*, at page 746:

> "A litigant may be punished for contempt by fine or imprisonment, or both. . . . but the Court should not prescribe, as a means by which he should purge himself of such contempt, that its doors be closed for him in defense of either his liberty or his property."

An examination of the realities of the instant case, moreover, clearly demonstrates that the contempt adjudication is merely the facade for an attempt to deny to petitioner the equal protection of the laws. The trial

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[13]The Court of Appeals recognized the basic difference between the *Hovey* and the *Hammond* cases: "The Hovey case holds it is a denial of due process to strip a defendant of his defenses as punishment for contempt. The Hammond opinion does not modify that rule; its holding is that, when a defendant has suppressed or failed to produce relevant evidence in his possession which he has been ordered to produce, a presumption arises as to the bad faith and untruth of his answer which justifies striking it from the record and rendering judgment as though by default." (178 F. (2d) at 687.)

Court's order (in the supplemental proceedings) was in aid of execution on the judgment. Respondents were seeking *satisfaction* of the judgment, since it had not been superseded.

The right to appeal in the State of Washington is, however, not conditioned upon the satisfaction of the judgment appealed from.[14] When petitioner pointed out that the motion to dismiss ultimately rested on the converse of this rule (R. 17, 18, 23), respondents in their Supplemental Motion for Dismissal of Appeal asked the Court below to direct ". . . the said Superior Court not to authorize any payment or distribution to creditors by said receiver until further order of this Court" (R. 24-25), thus converting their demand that petitioner *satisfy* the judgment to a demand that petitioner *supersede* the judgment *pro tanto* as a condition to its appeal.

This amended demand, however, was equally at odds with petitioner's statutory rights, since a supersedeas bond is likewise not a precondition to an appeal in the State of Washington.[15] In any event, the Court below did not adopt the suggested change; it ordered peti-

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[14]The relevant portion of RCW 4.88.060 provides. "The appeal bond must be executed in behalf of the appellant by one or more sufficient sureties, and shall be in a penalty of not less than two hundred dollars in any case; *and in order to effect a stay of proceedings* as in this section provided, the bond, where the appeal is from a final judgment for the recovery of money shall be in a penalty double the amount of the damages and costs recovered in such judgment and in other cases shall be in such penalty, not less than two hundred dollars, and sufficient to save the respondent harmless from damages by reason of the appeal, as a judge of the superior court shall proscribe . . ."

[15]See provisions of RCW 4.88.060 quoted in footnote 14, *supra*.

tioner to comply with the order to deliver the bonds to the receiver without any limitations, qualifications, or conditions.[16] Upon the failure of petitioner so to satisfy the judgment to the extent of $290,000, and for that reason only, petitioner's appeal was dismissed. (R. 53.)

We are thus presented with the situation where petitioner, unlike all other litigants in the State of Washington, is denied its appeal from an unsatisfied money judgment totaling almost a half a million dollars merely because it has failed to satisfy or supersede said judgment. It is respectfully submitted that such a case clearly deprives petitioner of the equal protection of laws. *Yick Wo v. Hopkins,* 118 U.S. 356; *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673; *Powell v. Alabama,* 287 U.S. 45; *Patterson v. Alabama,* 294 U.S. 600; *Missouri ex rel. Gaines v. Canada,* 305 U.S. 337; *Cochran v. Kansas,* 316 U.S. 255; *Shelly v. Kraemer,* 334 U.S. 1.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

January, 1954.

Respectfully submitted,

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[16]See footnote 3, *supra.*